Sapienza v Fenimore
2015 NY Slip Op 31486(U)
August 6, 2015
Supreme Court, New York County
Docket Number: 653913/2014
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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FRANCIS B. SAPIENZA, FRANCIS B. SAPIENZA ON BEHALF OF TOTAL OFFICE PLANNING SERVICES, INC., FRANCIS B. SAPIENZA ON BEHALF OF F&J REALTY ENTERPRISES, LLC,

Index No.: 653913/2014

DECISION & ORDER

Petitioners,

-against-

JAMES FENIMORE, TOTAL OFFICE PLANNING SERVICES, INC., F & J REALTY ENTERPRISES, LLC, OFFICE SOLUTION GROUP, LLC, OFFICE SOLUTION INSTALLATION, LLC,

Respondents.

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SHIRLEY WERNER KORNREICH, J.:

Respondents James Fenimore, Total Office Planning Services, Inc. (TOPS), and F&J Realty Enterprises, LLC (F&J) move by order to show cause to stay an arbitration commenced before the American Arbitration Association (the AAA) by petitioner Francis B. Sapienza and for a determination as to which, if any, of Sapienza's claims are arbitrable. Sapienza opposes. The motion is denied for the reasons that follow.

I. Procedural History & Factual Background

Unless otherwise indicated, the following facts are undisputed.

Sapienza and Fenimore have been business partners for approximately 30 years. In 1985, they founded TOPS, a New York corporation that operates in the tri-state area. TOPS sells and installs office furniture and systems, assisting customers in selecting furniture and planning their offices. It also warehouses office furniture on behalf of various manufacturers. TOPS, therefore, takes delivery of office furniture and stores it at its warehouse in New Jersey.

Additionally, Sapienza and Fenimore founded F&J, a New York limited liability company,[1] whose sole business consisted of leasing half of a Manhattan office to TOPS and leasing the other half to another tenant. F&J originally owned a property in Brooklyn that served as TOPS's warehouse and corporate headquarters, but sold it and acquired a commercial cooperative unit in Manhattan, where TOPS relocated its office. Further, when the Brooklyn warehouse was sold, TOPS began leasing warehouse space in New Jersey. Since TOPS's formation, Sapienza and Fenimore have been the only shareholders, each owning 50% of the company and each serving as the company's primary salesmen.

On May 28, 1991, Sapienza and Fenimore executed a Shareholders Agreement (the 1991 Agreement), which provides that they own 50% of the shares of TOPS and F&J (collectively, the Companies). *See* Dkt. 19. The 1991 Agreement, *inter alia*, governs how the Companies' shares must be purchased by TOPS upon the death of a shareholder. Section 9 of the 1991 Agreement provides that the Companions "shall continue to employ Fenimore and Sapienza to manage and operate the business of each corporation for so long as they are shareholders of the corporation." *See id.* at 10. Section 10 provides that "[a]ny dispute under this Agreement shall be settled by arbitration in the City of New York in accordance with the rules then obtaining of the [AAA]." *See id.* The 1991 Agreement does not set forth a procedure for dissolution of the Companies.

On February 17, 1993, Sapienza and Fenimore executed an amended Shareholders Agreement (the 1993 Amendment). *See* Dkt. 20. Sections 9 and 10 of the 1993 Agreement are virtually identical to the same numbered sections in the 1991 Agreement. *See id.* at 9.

On February 5, 2002, Sapienza and Fenimore executed the operative version of their Shareholders Agreement (the 2002 Agreement). *See* Dkt. 21. Section 7(b) of the 2002

[1] The Shareholders Agreements, discussed herein, erroneously refer to F&J as a corporation. F&J, however, is actually an LLC. *See* Dkt. 56 (2/3/15 Tr. at 2).

Agreement requires redemption of shares upon Disability. *See id.* at 7-8. Disability is defined as "the inability of a shareholder to perform his material duties as an officer or director of [the Companies] for a period of 120 days (whether or not consecutive) during any period of 280 consecutive days by reason of physical or mental incapacity." *See id.* at 8. The 2002 Agreement also contains a virtually identical corollary to section 9 in the prior Shareholders Agreement, but is contained in section 7(e). *See id.* at 10. The arbitration clause is contained in section 7(f), and again provides that "[a]ny dispute under this Agreement shall be settled by arbitration in the City of New York in accordance with the rules then obtaining of the [AAA]." *See id.* The 2002 Agreement does not set forth a procedure for dissolution of the Companies.

Sapienza began suffering medical problems in 2010. In November 2013, Sapienza and Fenimore had a "major professional and personal falling out." In early 2014, Sapienza and Fenimore began to discuss winding down the Companies. Fenimore was planning to retire and move to Florida. Prior to a wind-down agreement being reached, in April 2014, Sapienza was admitted to a hospital due to "acute renal failure and sever edema in both legs brought on by diabetes." Sapienza claims that, while he was ill,[2] Fenimore created two new companies, respondents Office Solution Group LLC and Office Solution Installation LLC (the New Companies) to continue operating the TOPS's business without Sapienza.

Since, as noted earlier, the 2002 Agreement does not contain a procedure for winding down the Companies, the parties sought to enter into an agreement governing dissolution. On June 18, 2014, Sapienza and Fenimore executed a Letter of Intent (the LOI), which begins as follows:

[2] The New York Division of Corporation's records indicate that the New Companies were formed on April 8, 2014. *See* Dkt. 3 & 4.

> This [LOI] confirms the intentions, understanding and agreement between [Fenimore] and [Sapienza] with respect to the proposed winding-down and dissolution [the Companies]. ... Except as otherwise expressly provided herein, the parties acknowledge that the provisions of this [LOI] are not intended to create or constitute any legally binding obligations, and the parties will not have any liability to the other arising out of this [LOI] until a formal plan of liquidation and articles of dissolution and other related documents (the "Definitive Agreements") are prepared, authorized and fully executed.

See Dkt. 5 at 2. The LOI then sets forth nine sections outlining the contemplated winding down and dissolution. Section 8 provides that only sections 1, 7, 8, and 9 are binding. *See id.* at 3. Section 1, titled "Existing Projects and Future Projects," provides:

> Effective on the close of business, Monday, June 30, 2014, TOPS will cease taking any new orders for new work projects from existing or prospective clients of TOPS with the exception of mutually agreed upon follow up service work for clients for whom TOPS completed job orders after December 31, 2013. After June 30, 2014, TOPS will continue to work on and complete all projects for clients for whom orders were taken prior to July 1, 2014. We are both aware that certain projects which were signed up with clients prior to July 1, 2014 will not commence work on such projects until after June 30, 2014. We will use our collective best efforts to cause TOPS to complete work on all outstanding client projects prior to December 31, 2014, provided that if certain projects are not completed by December 31, 2014, we will mutually agree in writing to extend the date of dissolution of TOPS to an additional time period not to exceed 30 days, unless mutually agreed in writing to extend further.

See id. at 2. The LOI does not have an arbitration clause.

Fenimore then proceeded to wind down the Companies. As part of that process, on July 23, 2014, Fenimore sold the Manhattan office owned by F&F for $6.2 million. On August 18, 2014, Fenimore emailed the closing statement to Sapienza. After mortgage and closing costs were paid, the balance was $3.487 million. Fenimore then paid off TOPS's outstanding Citibank credit line, which totaled $1,950,662. This left a balance of approximately $1.536 million. After Fenimore paid certain Company expenses (*see* Dkt. 30 at 4), there remained a balance of

approximately $1 million. Fenimore transferred this balance from F&J's bank account to TOPS's operating account.

On October 30, 2014, Sapienza demanded a distribution of half of these proceeds and an accounting from Fenimore. In a letter dated November 26, 2014, Sapienza informed Fenimore that the LOI "is hereby rescinded." *See* Dkt. 18. On December 22, 2014, Sapienza commenced this action by filing a petition in aid of arbitration. The petition was filed in his individual capacity and on behalf of TOPS and F&J. Sapienza then moved by order to show cause (the OSC) seeking a temporary restraining order (the TRO). He also requested the Companies' books and records and an injunction prohibiting Fenimore from operating the New Companies.

Sapienza claims that he was fraudulently induced to execute the LOI because he was too ill to realize what he was agreeing to.[3] Fenimore, on the other hand, avers that the LOI was the culmination of months of discussions about winding down the Companies. Sapienza also seeks to avail himself of a buyout, as defined in the section 7(e) of the 2002 Agreement, on the ground of Disability. Fenimore, however, submitted emails indicating that Sapienza actually resumed working after his release from the hospital. The court cannot rule on this issue since, as set forth below, disputes under the 2002 Agreement must be arbitrated. Finally, the parties accuse each other of myriad fiduciary breaches, such as improperly using company resources for personal use.

The OSC originally was presented to another Justice, and the parties stipulated to a TRO. *See* Dkt. 27. Prior to the preliminary injunction hearing, on January 13, 2015, Sapienza filed an amended petition. *See* Dkt. 28. On February 3, 2015, after the parties appeared before me for

[3] In paragraph 15 of Sapienza's original petition, he falsely claimed to have been in the hospital when he signed the LOI. His amended petition no longer asserts such a claim and concedes that the LOI was not presented to him until a few weeks after he was released from the hospital.

oral argument, the motion was denied and the TRO was vacated. *See* Dkt. 55 (order) & Dkt. 56 (2/3/15 Tr.).

Shortly thereafter, in February 2015, Sapienza commenced an arbitration proceeding before the AAA. His statement of claim, dated February 18, 2015, is virtually identical to his amended petition. *See* Dkt. 72. On March 12, 2015, Fenimore filed the instant motion seeking a stay of the arbitration. At oral argument, the court temporarily stayed the arbitration pending a decision on the instant motion. *See* Dkt. 83 (4/16/15 Tr. at 23-25).

II. Discussion

The parties dispute whether some or all of their claims arise "under" the 2002 Agreement. In other words, the issue is whether the 2002 Agreement's arbitration clause is broad or narrow. The parties further dispute whether arbitrability is a question for the arbitrator or the court. As noted earlier, the 2002 Agreement provides that the parties must arbitrate in accordance with the AAA rules. The AAA rules provide that the scope of the arbitrator's jurisdiction is a question for the arbitrator.

At the outset, it should be noted that the parties do not specify whether the Federal Arbitration Act (the FAA) or New York law applies.[4] Pursuant to 9 USC § 2, the FAA "applies to any arbitration provision in a contract that affects interstate commerce." *N.J.R. Assocs. v Tausend*, 19 NY3d 597, 601 (2012); *see Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247, 252 (2005) ("where a contract containing an arbitration provision 'affects' interstate commerce, disputes arising thereunder are subject to the FAA"); *see Krantz & Berman LLP v Dalal*, 472 FedAppx 76, 77 (2d Cir 2012) ("the term 'involving commerce' in the FAA signifies the 'broadest permissible exercise of Congress' Commerce Clause power"), quoting

[4] The parties rely on both federal and New York state case law, but do not take a clear position on which law applies.

Citizens Bank v Alafabco, Inc., 539 US 52, 56 (2003). The FAA applies here because the parties' disputes affect interstate commerce. As discussed earlier, the Companies' office was in New York, the warehouse was in New Jersey, and they serviced customers in the tri-state area.[5]

The FAA, therefore, governs. Under the FAA, "[t]wo questions are relevant to determining arbitrability:

> (1) whether the parties have entered into a valid agreement to arbitrate, and, if so, (2) whether the dispute at issue comes within the scope of the arbitration agreement. The first question – whether the parties have agreed to arbitrate in the first place – is one only a court can answer, since in the absence of any arbitration agreement at all, questions of arbitrability could hardly have been clearly and unmistakably given over to an arbitrator.
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> [With respect to] the second question – whether the scope of the agreement to arbitrate covers the dispute at issue – [c]ourts presume that the parties intend courts, not arbitrators, to decide ... disputes about arbitrability. Thus, unless the parties have clearly and unmistakably delegated to an arbitrator the authority to resolve issues of arbitrability, the question of whether or not a dispute is arbitrable

[5] The FAA's applicability in a case such as this has been recognized by the First Department:

> Courts have interpreted the term "involving commerce" broadly. In [*Allied–Bruce Terminix Cos. v Dobson*, 513 US 265 (1995)], the United States Supreme Court concluded that the purpose of the FAA—to reduce the amount of litigation through the enforcement of arbitration agreements—supports a broad interpretation of the term "involving commerce". The Court declined to restrict transactions involving commerce only to those "activities within the flow of commerce." Rather, it found the phrase "involving commerce" to be the equivalent of "affecting commerce," a term associated with the broad application of Congress's power under the Commerce Clause.
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> The Supreme Court reaffirmed this interpretation of "involving commerce" in *Citizens Bank*, stating that "it is perfectly clear that the FAA encompasses a wider range of transactions than those actually in commerce, that is, within the flow of interstate commerce". Further, the Court held that individual transactions do not need to have a substantial effect on interstate commerce in order for the FAA to apply. Rather, as long as there is economic activity that constitutes a general practice "bear[ing] on interstate commerce in a substantial way," the FAA is applicable.

Cusimano v Schnurr, 120 AD3d 142, 147-48 (1st Dept 2014) (citations omitted).

> is [also] one for the court. Where courts have the authority to make this determination, the federal policy in favor of arbitration requires that any doubts concerning the scope of arbitrable issues be resolved in favor of arbitration. Simply put, federal policy requires [courts] to construe arbitration clauses as broadly as possible. Hence, courts will compel arbitration unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

Gibbs v Holland & Knight LLP, 2015 WL 1941359, at *4-5 (Sup Ct, NY County 2015) (collecting cases; citations and quotation marks omitted), accord *Padro v Citibank, N.A.*, 2015 WL 1802132, at *4 (EDNY 2015); *see VRG Linhas Aereas S.A. v Matlin Patterson Global Opportunities Partners II L.P.*, 717 F3d 322, 326 (2d Cir 2013) ("a court must begin by deciding whether the parties before it clearly and unmistakably committed to arbitrate questions regarding the scope of their arbitration agreement. If—but only if—the answer is no, the court must then proceed to determine on its own whether the parties' dispute falls within the scope of their agreement to arbitrate").

In arguing that arbitrability in this case is a question for the court, respondents rely on *In re Kinoshita & Co.*, 287 F2d 951 (2d Cir 1961). That reliance is misplaced. In *Kinoshita*, "the Second Circuit held that the use of the phrase 'arising under' an agreement, in an arbitration clause, indicated that the parties intended the clause to be narrowly applied and, on that basis, concluded that a claim of fraud in the inducement did not 'aris[e] under' that agreement for purposes of the arbitration clause." *In re MF Global Inc.*, 496 BR 315, 321 (SDNY 2013), quoting *Kinoshita*, 287 F2d at 953. As numerous courts have recognized, *Kinoshita* may no longer be good law "in light of 'the Supreme Court's more recent decisions emphasizing the strong federal policy in favor of arbitration' and the frequent criticism to which the ruling has been subjected." *Abbvie Inc. v Mathilda & Terence Kennedy Institute of Rheumatology Trust*,

2013 WL 4729376, at *3 (SDNY 2013), quoting *ACE Capital Re Overseas Ltd. v Central United Life Ins. Co.*, 307 F3d 24, 32-33 (2d Cir 2002). For these reasons, "*Kinoshita* has been confined to 'its precise facts.'" *MF Global*, 496 BR at 321, quoting *ACE*, 307 F3d at 33. Given the modern strong policy in favor of arbitration, "the narrow arbitration clause is something of an endangered species." *Benihana of Tokyo, LLC v Benihana Inc.*, 2014 WL 3631759, at *10 (SDNY 2014) (*Benihana I*), *mod. on other grounds*, 784 F3d 887 (2d Cir 2015) (*Benihana II*),[6] citing *China Auto Care, LLC v China Auto Care (Caymans)*, 859 FSupp2d 582, 586 (SDNY 2012); *see Benihana I*, 2014 WL 3631759, at *10 n.9 ("The 'class of one' to which *China Auto Care* refers is [*Kinoshita*]. The Second Circuit has all but overturned *Kinoshita*, repeatedly narrowing its holding to its precise facts—that is, to the phrase 'arising under' or, at most, to its equivalent.) (citations and quotation marks omitted).

Other Circuit Courts of Appeal have expressly rejected *Kinoshita* "as not being in accord with present day notions of arbitration as a viable alternative dispute resolution procedure." *Gregory v Electro-Mech. Corp.*, 83 F3d 382, 385 (11th Cir 1996) (noting that "[o]nly the Ninth Circuit seems to have followed the decision in *Kinoshita*."); *see also Dialysis Access Ctr., LLC v RMS Lifeline, Inc.*, 638 F3d 367, 381 (1st Cir 2011) ("We agree with the majority of the federal circuits and find that the analysis in *Kinoshita* is not consistent with the strong federal pro-arbitration policy set forth by the FAA. Said policy establishes a presumption in favor of arbitrability where, as here, a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand"). *Kinoshita* is not binding on this court and has been narrowed by the court which issued it. Moreover, it is incompatible with modern Supreme Court arbitration jurisprudence, and the facts of this case and the arbitration clause herein are not

[6] *Benihana II* was decided after oral argument on the instant motion. As discussed below, *Benihana II* sets forth the limited role of courts during the pendency of arbitration.

identical to *Kinoshita*. Consequently, the court rejects respondents' argument that *Kinoshita* mandates a ruling in their favor.

More on point is *Zachariou v Manios*, 68 AD3d 539 (1st Dept 2009). There, the court held that "[w]here there is a broad arbitration clause and the parties' agreement specifically incorporates by reference the AAA rules providing that the arbitration panel shall have the power to rule on its own jurisdiction, courts will 'leave the question of arbitrability to the arbitrators.'" *Id.* at 539, quoting *Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's*, 66 AD3d 495, 496 (1st Dept 2009), *aff'd* 14 NY3d 850 (2010), quoting *Smith Barney Shearson Inc. v Sacharow*, 91 NY2d 39, 47 (1997); *see also Flintlock Const. Services, LLC. v Weiss*, 122 AD3d 51, 54 (1st Dept 2014) ("Where parties agree that the AAA rules will govern, questions concerning the scope and validity of the arbitration agreement, including issues of arbitrability, are reserved for the arbitrators"). The *Zachariou* court, however, further held that where "the parties' agreement contains a narrow arbitration provision, the reference to the AAA rules does not constitute clear and unmistakable evidence that they intended to have an arbitrator decide arbitrability. Thus, that question is for the court to decide in the first instance." *Id.* at 539. Since *Zachariou* was decided, federal courts in FAA cases have ruled similarly when faced with arbitration clauses requiring application of the AAA's rules. *See, e.g., NASDAQ OMX Group, Inc. v UBS Secs. LLC*, 957 FSupp2d 388, 405 (SDNY 2013), *aff'd* 770 F3d 1010 (2d Cir 2014); *see also Microsoft Corp. v Samsung Electronics Co.*, 60 FSupp3d 525, 529-30 (SDNY 2014) (noting similarity between FAA and New York law, and setting forth identical standard where parties' arbitration agreement required application of International Chamber of Commerce rules).

The 2002 Agreement's arbitration clause requires arbitration of "[a]ny dispute under this Agreement." It provides for no exceptions. *See McDonnell Douglas Fin. Corp. v Penn. Power & Light Co.*, 858 F2d 825, 832 (2d Cir 1988) ("In construing arbitration clauses, courts have at times distinguished between 'broad' clauses that purport to refer all disputes arising out of a contract to arbitration and 'narrow' clauses that limit arbitration to specific types of disputes"). This is a broad arbitration clause. *See id.; see also Pictet Funds (Europe) S.A. v Emerging Managers Group, L.P.*, 2014 WL 6766011, at *8 (SDNY 2014) ("Most arbitration clauses are broad, such that they cover all disputes 'arising out of' or 'relating to' the underlying agreement"), citing *Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.*, 37 NY2d 91, 95 (1975) ("More typically the parties adopt a 'broad' arbitration clause agreeing generally to submit to arbitration all disputes arising out of the contract, or any dispute relating to the meaning and interpretation of the underlying agreement.").

Nonetheless, some of the parties' disputes may not arise under the 2002 Agreement. For instance, the LOI, a separate contract,[7] does not have an arbitration clause. Fenimore, therefore, argues that claims arising under or for fraudulent inducement of the LOI are not subject to arbitration. While the parties disagree about the breadth of the arbitration clause, they do agree that whatever claims arise "under" the 2002 Agreement must be arbitrated. An issue that appears to be driving the parties' disputes (the resolution of which may well result in a settlement of the other claims asserted) is Sapienza's claim that he was Disabled – a claim under the 2002 Agreement. Moreover, to the extent the parties dispute which of their other claims concerning corporate matters are subject to arbitration, that is for the arbitrator to decide. Indeed, their

[7] Of course, as noted earlier, only certain sections are binding while others are merely an agreement to agree.

dispute about the meaning of the word "under" – a contractual interpretation dispute – is itself a dispute "under" the 2002 Agreement.

To the extent that some of the parties' disputes implicate matters not expressly governed by the 2002 Agreement, such disputes will not be resolved by the court at this time. The fact that "some of the relief requested in the arbitration … appears to fall outside the narrow arbitration clause [] is not a basis to stay the arbitration." *Zachariou*, 68 AD3d at 540, citing *Silverman v Benmor Coats, Inc.*, 61 NY2d 299, 309 (1984) ("An application for a stay will not be granted ... even though the relief sought is broader than the arbitrator can grant, if the fashioning of some relief on the issue sought to be arbitrated remains within the arbitrator's power"). Where, as here, Fenimore "has failed to show that the matter sought to be arbitrated is beyond the arbitrator's power to grant some relief[,] [the court] cannot assume in advance that the arbitrator will exceed his powers as delineated in the parties' narrow[8] arbitration provision, and in the event the arbitrator does so, the arbitration award will be subject to vacatur." *Zachariou*, 68 AD3d at 540, citing *Bd. of Ed. of Lakeland Cent. School Dist. of Shrub Oak v Barni*, 49 NY2d 311, 315 (1980).

Any further involvement by this court prior to arbitration would violate New York public policy. *See Pine Street Assocs., L.P. v Southridge Partners, L.P.*, 107 AD3d 95, 104 (1st Dept 2013) ("[A]rbitration is favored and encouraged, to promote the announced policy of conserving judicial resources, as well as the time and resources of the parties to the arbitration agreement. Consistent with this policy, the courts are accorded only a limited role in the arbitral process. To avoid becoming embroiled in issues collateral to the dispute that the parties have agreed to

[8] Ergo, even if the subject arbitration clause was as narrow as Fenimore avers, arbitration would still proceed first, since the court must assume the arbitrator will not exceed his or her jurisdiction.

arbitrate, the courts are admonished to prevent parties to such agreements from using the courts as a vehicle to protract litigation.") (quotation marks omitted), citing *Nationwide*, 37 NY2d at 95.

Likewise, as the Second Circuit recently explained:

> Once arbitrators have jurisdiction over a matter, any subsequent construction of the contract and of the parties' rights and obligations under it is for the arbitrators to decide. If the parties have agreed to arbitrate a dispute, a court has no business weighing the merits of the [claims], considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all [claims] to arbitration, not merely those which the court will deem meritorious.
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> Considerations of judicial economy and efficient dispute resolution also counsel against a [trial] court's assessment of the merits of a pending arbitration. If a remedy sought by a party in arbitration indeed finds no support in the parties' agreement, the [trial] court has no reason to presume that the arbitrators are likely to grant it. There is little to be gained from a [trial] court's opining on a hypothetical award that likely will never materialize. Moreover, for a court to preview the issues that a party seeks to present to the arbitrator, and decide the merits of some of those issues in advance, risks delaying the arbitration process, and divides the issues to be resolved between two decision-makers, where the parties selected a unitary dispute resolution process in the hopes that such a procedure would be more expeditious than litigation in court.
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> Refraining from a view on the merits until after an arbitral decision has been rendered will also aid the [trial] court in applying the proper highly-deferential standard of review to those decisions. [A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, a court's conviction that the arbitrator has committed serious error in resolving the disputed issue does not suffice to overturn his decision. [T]he sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.

Benihana II, 784 F3d at 899-902 (citations and quotation marks omitted).

For these reasons, this action[9] is stayed pending the conclusion of the parties' arbitration. To the extent the arbitrator finds any of Sapienza's claims to be beyond his jurisdiction, and, if

[9] The other related action before this court, styled *Fenimore v Sapienza*, Index No. 650763/2015, is also stayed. It should be noted that Sapienza's recently filed answer and counterclaims in that action did not waive his right to arbitration. His answer was due and was filed to avoid defaulting. No discovery has taken place in that action. These circumstances are insufficient to

after the arbitrated claims are resolved, the parties seek to litigate claims not properly raised before the arbitrator, they may do so in this court. Accordingly, it is

ORDERED that the motion by respondents James Fenimore, Total Office Planning Services, Inc., and F&J Realty Enterprises, LLC to stay arbitration against petitioner Francis B. Sapienza is denied; and it is further

ORDERED that the temporary stay of the parties' arbitration, issued on the April 16, 2015 record, is hereby vacated; and it is further

ORDERED that this action and the action under Index No. 650763/2015 are stayed pending the issuance of a final decision in the parties' arbitration.

Dated: August 6, 2015

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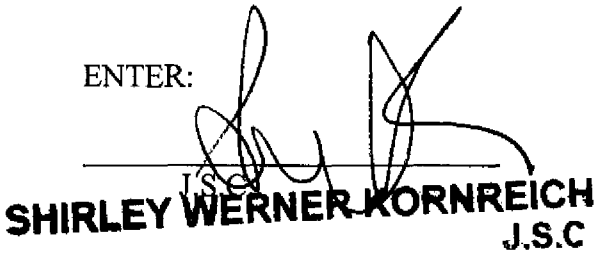

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constitute a waiver under the FAA. *See Cusimano*, 120 AD3d at 150 ("A party does not waive the right to arbitrate simply by pursuing litigation, but by "engag [ing] in protracted litigation that results in **prejudice** to the opposing party") (emphasis added), quoting *Kramer v Hammond*, 943 F2d 176, 179 (2d Cir 1991); *see generally Gramercy Advisors LLC v J.A. Green Dev. Corp.*, 2015 WL 1623789, at *7-11 (Sup Ct, NY County 2015) (discussing prejudice required to constitute waiver of arbitration*); see also Sutherland v Ernst & Young, LLP*, 600 FedAppx 6, 8 (2d Cir 2015) (This Court "has refused to find waiver in a number of cases where delay in trial proceedings was not accompanied by substantial motion practice or discovery."), quoting *Thyssen, Inc. v Calypso Shipping Corp.*, 310 F3d 102, 105 (2d Cir 2002) (collecting cases). No such prejudice exists here.